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UPDATE

ENVIRONMENT

UNNATURAL CLAIMS

Litigation Industry Usurps Regulators' Role; Credible Claims Suffer

Environmental litigation is deeply rooted in Anglo-American law: the common-law tort of nuisance, which emerged in twelfth-century Britain,[1] allows individuals to recover compensation for "real injuries" to their "lands."[2] Some modern environmental litigation, most prominently that which seeks redress for injuries generated by the oil spill from BP's Gulf of Mexico *Deepwater Horizon* rig, falls well within this historical paradigm. Images of oil washing up on Gulf beaches and bayou marshes demonstrate obvious coastal harms, and few would maintain that owners of beachfront property and others directly injured by the oil leaked into the Gulf do not have a basis for making claims against the company or companies responsible.

But much of the litigation sure to flow from the spill is of a very different character. How should we think about suits charging BP with securities fraud for not making clear its safety risks? What about suits alleging pension fraud for not making clear the financial threat to the company's retirees posed by its Gulf of Mexico operations? And what about suits that target not just BP but all oil companies, not for oil actually spilled but for the threat of rising sea levels resulting from global warming, itself indirectly caused at least in part by the use of fossil fuels?

Mark Lanier

AP Photo/Mary Godleski

Modern environmental litigation includes each of these types of lawsuits; and very real and valid claims—such as those inevitably facing BP—are, in some cases, less attractive to avaricious trial lawyers than speculative claims related only tangentially, if at all, to actual injury. Lawyers have already launched such claims, even though the actual damage bill has not yet been tallied. Texas's Mark Lanier is an asbestos lawyer who became a celebrity of sorts when he won a $253.5 million jury verdict in the first case to go to trial alleging injuries caused by Merck's blockbuster painkilling drug, Vioxx (the verdict was later reversed on appeal).[3] Lanier has now announced his intention to file class actions and other lawsuits claiming not only direct losses from the Gulf spill but in pension and securities investments resulting from declines in BP's share price as the spill's huge cost became clear.[4]

In addition, lawsuits alleging health injuries stemming from oil exposure will drag on for decades, some analysts expect.[5] If the history of mass toxic torts like Vioxx, fen-phen, and asbestos is any guide, many, if not most, of the lawsuits in this latter class of cases will be dubious. High-profile class-action and mass-tort attorneys—whom we like to call Trial Lawyers, Inc.—rely on the unique rules of American law to overwhelm corporate defendants with so many claims that companies are unable to defend against them all in court and must instead reach "mass

THE SUPREME COURT GIVES A GREEN LIGHT

In *Massachusetts v. EPA*, a group of state governments, local governments, and activist environmental organizations led by Massachusetts sued the U.S. Environmental Protection Agency (EPA). The lawsuit challenged the agency's 2003 conclusion that carbon dioxide was not an "air pollutant," as the Clean Air Act Amendments of 1990 defined the term, and thus did not fall within the agency's jurisdiction. The U.S. Supreme Court, in 2007, disagreed, dividing 5–4.[6] Chief Justice Roberts issued a strong dissent arguing that the plaintiffs lacked legal standing to sue in federal court because they had not adequately alleged injuries that they had already suffered from climate change.[7] Although a narrow regulatory-powers decision, the court's ruling that the plaintiffs in the case had standing to sue over global warming was a powerful shot in the arm for other climate-change lawsuits.

settlements" that invariably compensate undeserving plaintiffs, under-compensate genuinely injured victims, and give the lawyers a healthy cut of the overall proceeds.[8] If courts are the primary locus for recovery and remediation of the Gulf oil spill, genuinely injured people and businesses are likely to suffer the same disappointments that true asbestos victims have.

ENVIRONMENTAL TORTS BASED ON INJURY IN FACT

Long before we had regulatory agencies like the Environmental Protection Agency (EPA), the courts were the preferred government forum for remedying environmental injuries. Our free-market, property-based legal regime treats commerce as advancing not only the parties' mutual benefit but society's in general. But the law has also long recognized the cost of some economic activity to individuals not party to the exchange, as when a smokestack emits fumes that blow onto neighbors' property. Thus, there is a common-law tort of nuisance to deal with environmental pollution, just as there is a civil action available in the case of physical assault or libelous speech. Indeed, the tort of nuisance is so well entrenched in American law that the U.S. Supreme Court has given it constitutional weight.[9]

In traditional nuisance suits, an individual has had to demonstrate harms directly flowing from another's actions. The remedy sought in such cases was typically economic damages to make the injured property owner whole. If, however, the harms were dispersed and did not peculiarly or disproportionately harm a particular party, lawsuits alleging a "public nuisance" would often be filed. Many of these would seek injunctive relief to prevent the offending party from continuing the harmful activity. In the pre-regulatory era, such suits were effectively devices to force municipalities to remove trees from roadways, for example, or to stop companies from discharging effluents into public waterways or emitting unpleasant vapors and gases that disturbed nearby residents.

But traditional nuisance suits do not manage many environmental harms well. Injuries are sometimes too dispersed to be remedied by damage awards to individuals, and causation too speculative or remote to meet historical legal norms. Lay juries are generally ill-equipped to make scientific judgments on complex environmental questions. In addition, tort law is necessarily retrospective, not prospective: plaintiffs must show that they have actually been injured and that the party being sued caused the injury. Because it makes sense to prevent environmental injuries, instead of addressing them after they occur—and because unpredictable civil litigation is a crude regulatory device at best—modern states, including the United States and others with advanced economies, have developed regulatory regimes that place boundaries around economic activities that risk generating environmental damage.

REGULATION THROUGH LITIGATION

Notwithstanding the general trend toward regulation, environmental activists, upset that their agenda has not been fully adopted by legislatures or regulatory bodies, have tried to use the courts to achieve their desired results. Some such efforts are at least defensible as challenges to the decisions of regulatory bodies. For example, in *Massachusetts v. EPA*, a group of states,

local governments, and environmental groups sued the EPA to force it to regulate the emission of carbon dioxide and other greenhouse gases (see box, p. 3). The lawsuit, whatever its defects, at least implicitly recognized the agency as the appropriate body for addressing man-made pollution contributing to climate change.

AP Photo/Michelle McLoughlin

Many other lawsuits, however, have sought to use tort law to supplant rather than force regulation, often by seeking injunctive relief. Such suits seek to circumvent statutory and regulatory schemes and turn the courts into alternative environmental regulators. In *Cooper v. Tennessee Valley Authority*, North Carolina attorney general Roy Cooper alleged that energy plants in Alabama, Kentucky, and Tennessee of the federally owned Tennessee Valley Authority (TVA) created a public nuisance for North Carolina.[10] In response, U.S. District Court Judge Lacy Thornburg issued an injunction mandating that four TVA plants install emission controls, at a cost of over $3 billion, notwithstanding that Alabama and Tennessee law explicitly authorized the plants to operate *without* such controls.[11] Sensibly, on July 26, 2010, the Fourth U.S. Circuit Court of Appeals overturned Thornburg's injunction. The court noted that the federal Clean Air Act already had extensive statutory procedures that North Carolina could use to petition its case, that "Congress in the Clean Air Act opted rather emphatically for the benefits of agency expertise in setting standards of emissions controls," and that Thornburg's injunction would have "encourage[d] courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air."[12]

In *Connecticut v. American Electric Power*, filed in 2004 on behalf of eight states, the City of New York, and three land trusts, political operatives are seeking to get courts to regulate companies directly by forcing them "to cap and then reduce their carbon dioxide emissions," which, the suit alleges, are "contributing to global warming."[13] The Second U.S. Circuit Court of Appeals reversed the trial court's decision to dismiss the complaint as a nonjusticiable political question, rejected the claim that the public-nuisance claim was displaced by the Clean Air Act, and allowed this lawsuit—which is far more speculative than the one rejected by the Fourth Circuit in *Tennessee Valley Authority*—to proceed. Leading the charge in this litigation is Connecticut attorney general Richard Blumenthal, who unabashedly exclaimed, "Our legal fight is against power companies that emit a huge share of our nation's CO_2 contamination, but it will set a precedent for all who threaten our planet."[14] Similar lawsuits seeking to regulate companies allegedly linked to global warming have been filed by California (in a case that has since settled) and a small village on a boundary island in Alaska (in a case still pending).[15]

In such suits, activist groups—or state attorneys general seeking their support—are trying to make an end run around regulators or legislatures to achieve policy goals. One should not assume that pecuniary motives are absent from such suits: in addition to earning themselves substantial publicity, the state AGs often receive the largesse of lawyers involved in the form of direct or in-kind campaign assistance; and trial lawyers get to enlist the state attorneys general to press for judicial rulings that would make future litigation more profitable. In some cases, they get hefty contingency fees for doing the states' work.

GOING BEYOND THE FACTS

Environmental litigation is rife with cases in which liability claims proceed, though lacking traditional legal norms like injury and causation. In Madison County, Illinois—an infamously pro-lawsuit jurisdiction, which the American Tort Reform Association has dubbed a "judicial hellhole"[16]—the Baron & Budd and Korein Tillery law firms (each featured in previous editions of *Trial Lawyers, Inc.*) have launched lawsuits alleging injury from the widely used pesticide atrizine, despite a 2006 EPA finding that the product posed no health hazard.[17]

Similarly questionable litigation that conflicts with federal regulatory judgments, also involving Baron & Budd as well as New York mass-tort firm Weitz & Luxenberg, has targeted oil companies for adding the oxygen-rich compound MTBE (methyl tertiary butyl ether) to gasoline. Oil companies began using the chemical—which reduces smog, lowers the total amount of toxic emissions, prevents "knocking" in engines, and serves as a replacement for lead—in 1979; they accelerated their use of it after Congress not only authorized but encouraged it in the Clean Air Act Amendments of 1990.[18] Congress had reached the policy judgment that adding MTBE to motor fuel produced a net benefit, even though the chemical can affect the taste of drinking water if it enters the water supply. In its 1997 Drinking Water Advisory, the EPA determined that "there is little likelihood that MTBE in drinking water will cause adverse health effects" in observed concentrations.[19]

Nonetheless, more than seventy lawsuits have been filed against oil companies for using MTBE, many of them led by states and municipalities alleging a public nuisance and seeking money for facilities to eliminate the additive from drinking water (with a large chunk of the proceeds going to the contingency fees of plaintiffs' lawyers hired to handle the cases).[20] In May 2008, several oil companies settled suits, for $423 million,[21] and in October 2009, New York City won the first of these cases to come to trial, hitting Exxon-Mobil with a $104.7 million verdict.[22] (Oil companies ceased using MTBE in 2006,[23] in reaction to the litigation and Congress's failure to shield companies from liability.)

In some environmental cases, the injury is clear but the chain of causation much less so. For example, in *Comer v. Murphy Oil USA*,[24] veteran asbestos lawyer F. Gerald Maples is alleging that the defendant oil and energy companies are responsible for property damage on the Gulf coast caused by 2005's Hurricane Katrina, under the theory that the hurricane's severity was attributable to global warming, for which the companies are responsible.[25] One prominent mass tort litigator, Russell Jackson, characterized the suit's rationale as "the litigator's equivalent to the game 'Six Degrees of Kevin Bacon.' "[26]

Even if one accepts the argument that higher global temperatures lead to more severe weather patterns, it hardly follows that *this* hurricane was caused or exacerbated by a temperature rise, at least as causation has traditionally been applied in a legal context.[27] Moreover, the companies in question account for only a small fraction of the global carbon dioxide emissions that scientists have linked to global warming (see graphs, p. 6).[28] China exceeds the United States in carbon dioxide emissions, and the non-OECD or developing economies produce more greenhouse gases than all the developed nations of the world put together.[29] The companies being sued in *Comer* might have contributed to global warming, but it hardly makes sense to suggest that they *caused* it—any more than it makes sense to hold Uncle Eddie responsible because he drives an SUV or Aunt Betty because she flew to Florida for the holidays.

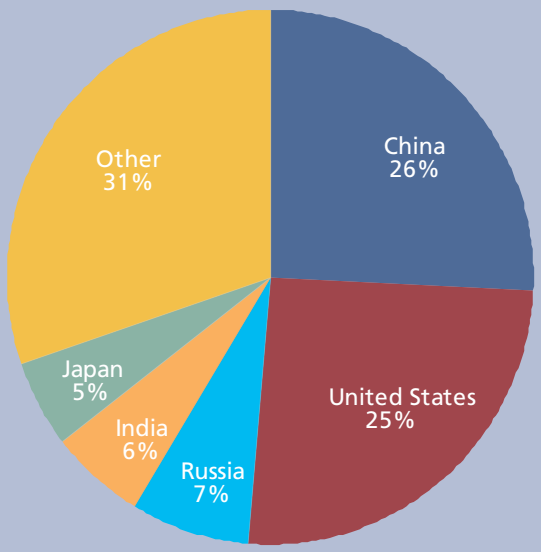
As the Second U.S. Circuit Court did in *Connecticut*, a panel of judges on the Fifth Circuit reversed the district court's decision that the *Comer* case posed a nonjusticiable political question,[30] though that decision has now been vacated by a broader Fifth Circuit panel.[31] Presumably, the attorneys pushing this dubious lawsuit will try to get the U.S. Supreme Court to hear the case on appeal.

SEC: THE SUE EVERYONE COMMISSION?

In January, the Securities and Exchange Commission (SEC) voted along party lines to force publicly traded companies to disclose potential liabilities relating to climate change—including the risk that new environmental laws might curtail profits and that financial losses might stem from increasingly volatile weather patterns.[32] Charges of politicizing securities regulation to promote an environmental agenda flew,[33] but the true beneficiaries of this ruling are trial lawyers. With substantial civil liability flowing from allegedly false disclosures or failures to disclose material information—either under traditional "fraud on the market" theories or new, heightened requirements contained in the 2002 Sarbanes-Oxley regulatory regime[34]—the SEC guidance enables Trial Lawyers, Inc. to add environmental lawsuits to its securities-litigation business line.

TODAY:

The United States Is Responsible for Only a Fraction of Industrialized Nations' Manmade Greenhouse Gas Emissions

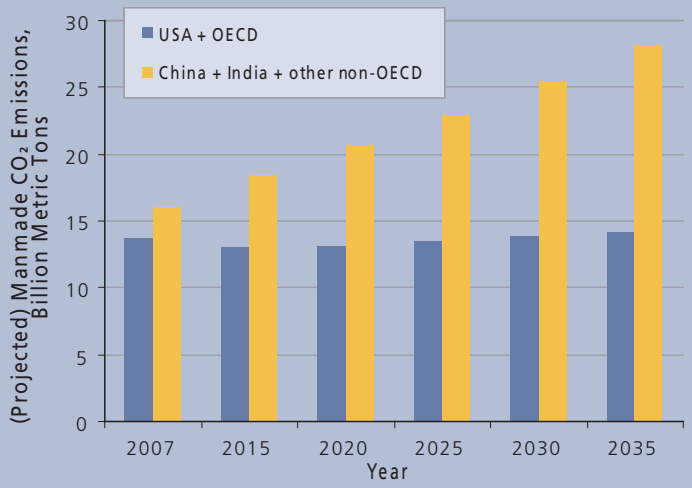


Total Carbon Dioxide Emissions, Top 20 Nations

Source: Union of Concerned Scientists

IN THE NEAR FUTURE:

And Developed Nations' Share of Global Emissions Is Expected to Fall over the Next 25 Years



Source: Energy Information Administration (EIA), 2010 International Energy Outlook

RETHINKING ENVIRONMENTAL LITIGATION

The very real damage wrought by the BP oil spill highlights the need for a mixed legal and regulatory approach to environmental problems. Regulatory standards are essential to preventing future disasters, as well as to limiting smaller but still-significant harms wrought by modern industrial processes. Liability as well is justified when parties have been directly injured by environmental polluters, in the BP case as well as others. Although the Oil Pollution Act of 1990 places some limits on oil-spill-related liability, BP has announced that it is waiving such limits in this case.[35] As leading libertarian legal scholar Richard Epstein, someone generally critical of lawsuit abuse, attests, "[T]he legal system should never allow self-interested parties to keep for themselves all the gains from dangerous activities that unilaterally impose losses on others."[36]

For environmental disasters like the BP spill, however, litigation can be a crude tool for compensating those genuinely injured. Lawyers' fees soak up as much as a third of the proceeds. And actual payouts can be delayed for years as lawyers fight in court; it took nineteen years for the litigation stemming from the *Exxon Valdez* oil spill to be resolved.[37] Indeed, the Obama administration's decision to pressure BP to set up a $20 billion fund[38] to pay potential claimants implicitly acknowledges the cost and delays of traditional litigation to remedy such massive injuries. The fund's administrator, Kenneth Feinberg, won plaudits for his management of the September 11 Victims Compensation Fund,[39] and early indications are that Feinberg is working aggressively to give rapid payouts to oil-spill victims


Kenneth Feinberg

AP Photo/Alex Brandon

in exchange for their agreeing to surrender future liability claims.[40] Let's hope that Feinberg lives up to his impressive record for efficiency, though not at the cost of denying those most seriously affected their day in court.

It is the character of Trial Lawyers, Inc. today to ignore legitimate claims arising from actual harm to the environment, and the lives that depend on it to be clean and safe, in favor of far more speculative claims extrapolated from theory. Lawsuits that cannot demonstrate tangible injuries, that rest on attenuated theories of causation, or that allege tort injuries from conduct authorized by legislative and regulatory judgments have no place in the courts. Circumventing the democratic process may appeal to those who simply have no patience for public debate, but the courts are hardly the appropriate forum for resolving complex international policy dilemmas like global warming.

Endnotes

1 *See* C. H. S. Fifoot, History and Sources of the Common Law: Tort and Contract 3-5 (1949) (dating the roots of nuisance back to ancient writs in twelfth-century England), *reviewed by* Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941 (2008).

2 *See* William Blackstone, 3 Commentaries, *216–17.

3 *See* Merck & Co. v. Ernst, 296 S.W.3d 81, 90, 100 (Tex. App. 2009) (reversing judgment in Ernst case, with initial $253.5 million jury verdict); Heather Won Tesoriero, *Merck Loss Jolts Drug Giant, Industry*, Wall St. J., Aug. 22, 2005, at A1 (covering original verdict).

4 *See* Dionne Searcey, *Lanier Seeks to Repeat Courtroom Success*, Wall St. J, June 18, 2010; Press Release, *Oil Spill Lawsuit*, Lanier Law Firm, http://www.lanierlawfirm.com/law_firm_news/oil_spill_lawsuit.htm; Press Release, *The Lanier Law Firm Investigating 401(k) Retirement Plan for BP Employees*, Lanier Law Firm, http://www.lanierlawfirm.com/law_firm_news/bp_401k_retirement_plan_investigation.htm.

5 *See* Daniel Fisher and Asher Hawkins, *BP's Legal Blowout*, Forbes.com, July 14, 2010, http://www.forbes.com/2010/07/14/bp-oil-spill-settlement-business-energy-lawsuits.html.

6 *See* Massachusetts v. E.P.A., 549 U.S. 497, 535 (2007).

7 *See id.*, at 539-49 (Roberts, C.J., dissenting).

8 *See, e.g.*, CSX Transportation v. Gilkison, No. 05-cv-202, (N.D. W. Va. July 5, 2007) (Am. Compl. ¶¶ 110-52); Jonathan D. Glater, *Many Silica-Damage Plaintiffs Also Filed Claims Over Asbestos*, N.Y. Times, Feb. 5, 2005, at C1 (citing Claims Resolution Management Corporation) ("[O]f 8,629 [silicosis] plaintiffs . . . 5,174 had already filed asbestos claims.); Alison Frankel, *The Fen-Phen Follies*, Am. Law., Mar. 1, 2005.

9 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992) (looking

to "background principles of nuisance and property law" to determine whether a regulatory taking passes muster for Fifth Amendment purposes).

[10] *See* State ex rel. Cooper v. Tenn. Valley Auth., 593 F.Supp.2d 812, 815 (W.D.N.C. 2009), *rev'd*, 2010 WL 2891572 (4th Cir. July 26, 2010) .

[11] *See id.* at 831–34; 2010 WL 2891572, at *13 (observing that "TVA's electricity-generating operations are expressly permitted by the states in which they are located").

[12] *See* 2010 WL 2891572, at *1, 9.

[13] *See* Conn. v. Am. Elec. Power, 582 F.3d 309, 314, 352 (2d Cir. 2009).

[14] *See* Press Release, Connecticut Attorney General's Office, Attorney General Praises Appeals Court Ruling Reinstating Global Warming Lawsuit (Sept. 21, 2009), *available at* http://www.ct.gov/ag/.

[15] *See* State ex. rel. Lockyer v. General Motors Corp., No. 05-755, 2006 WL 2526547 (N.D. Cal. Sept. 20, 2006), *dismissed* (Sept. 17, 2007); Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).

[16] *See* American Tort Reform Foundation, Judicial Hellholes (2009-2010), http://www.atra.org/reports/hellholes/.

[17] *See* Justin Anderson, *Ban on Atrazine Would Stagger Agriculture, Experts Say,* Legal Newsline.com, July 16, 2010, http://www.legalnewsline.com/spotlight/227985-ban-on-atrazine-would-stagger-agriculture-experts-say; Triazine Cumulative Risk Assessment, Environmental Protection Agency (Mar. 28, 2006), *available at* http://www.epa.gov/oppsrrd1/REDs/triazine_cumulative_risk.pdf.

[18] *See* Jad Mouawad, *Oil Giants to Settle Water Suit*, N.Y. Times, May 8, 2008.

[19] *See* Concerns About MTBE, Environmental Protection Agency, http://www.epa.gov/mtbe/faq.htm#concerns (last visited Aug. 2, 2010).

[20] *See* Thom Weidlich, *Exxon Found Liable for Fouling New York City Water with MBTE*, Bloomberg, October 20, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aSbQlUTdlAYw.

[21] *See* Mouawad, *supra* note 18.

[22] *See* Weidlich, *supra* note 20.

[23] *See* Mouawad, *supra* note 18.

[24] Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009), *vacated by* 607 F.3d 1049 (May 28, 2010).

[25] *See id.* at 859.

[26] *See* Posting of Walter Olson to PointofLaw.com, http://www.pointoflaw.com/archives/2009/10/suing-oil-compa.php (Oct. 22, 2009, 12:14 EST).

[27] In tort law, a plaintiff's injury must have been proximately caused by a defendant. A proximate cause is one "which, in a natural and continuous sequence, unbroken by any intervening cause, produces injury, and without which the result would not have occurred," *i.e.*, "the primary or moving cause." Black's Law Dictionary 1225 (6th ed. 1990).

[28] *See* U.S. Energy Information Administration, International Energy Outlook 2010—Highlights, http://www.eia.doe.gov/oiaf/ieo/highlights.html (last visited Aug. 2, 2010)

[29] *See id.*; Union of Concerned Scientists, Global Warming: Each Country's Share of CO2 Emissions, http://www.ucsusa.org/global_warming/science_and_impacts/science/each-countrys-share-of-co2.html (last visited Aug. 2, 2010).

[30] *See* Comer, 585 F.3d at 860.

[31] The full Fifth Circuit vacated the panel's judgment for *en banc* consideration, 598 F.3d 208 (Feb. 26, 2010); it was unable to meet a quorum to reconsider the case *en banc* because eight of the court's judges recused themselves on the grounds that they each owned stock in at least one of the 150 companies targeted in the litigation, so the panel decision remained vacated, and the appeal was dismissed, 607 F.3d 1049 (May 28, 2010).

[32] *See* Kara Scannell & Siobhan Hughes, *SEC Votes for Corporate Disclosure of Climate Change Risk*, Wall St. J., Jan. 27, 2010.

[33] *See* Commissioner Kathleen L. Casey, Speech by SEC Commissioner: Statement at Open Meeting—Interpretive Release Regarding Disclosure of Climate Change Matters, Jan. 27, 2010, http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm.

[34] *See generally* Henry N. Butler & Larry E. Ribstein, The Sarbanes-Oxley Debacle: What We've Learned; How to Fix It (2006).

[35] *See* Richard A. Epstein, *BP Doesn't Deserve a Liability Cap*, Wall St. J., June 16, 2010.

[36] *Id*.

[37] *See* Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (2008).

[38] *See* Jeff Mason, *BP Agrees to $20 Billion Spill Fund*, Reuters, June 17, 2010, *available at* http://uk.reuters.com/article/idUKTRE64U0OW20100616.

[39] *See, e.g.*, James R. Copland, Tragic Solutions: The 9/11 Victim Compensation Fund, Historical Antecedents, and Lessons for Tort Reform (Jan. 13, 2005), *available at* http://www.manhattan-institute.org/pdf/clpwp_01-13-05.pdf.

[40] *Feinberg Says BP Fund Will Be Generous, Better Than Lawsuits*, Bloomberg Business Week, July 15, 2010, *available at* http://www.businessweek.com/news/2010-07-15/feinberg-says-bp-fund-will-be-generous-better-than-lawsuits.html.

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